BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LISA C. HERNANDEZ Claimant	)	
VS.	)	Docket No. 1,063,398
U.S.D. 229 Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 20, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Leah Brown Burkhead of Mission, Kansas, appeared for claimant. Christopher McCurdy of Overland Park, Kansas, appeared for the self-insured respondent.

The ALJ found claimant's injury occurred out of and in the course of her employment as the causal action was distinguishable from normal activities of day-to-day living. Accordingly, the ALJ ordered respondent to designate an authorized orthopedic specialist to evaluate claimant's injury and provide any necessary treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 20, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's injury did not arise out of and in the course of employment but rather was the result of an action of daily living. Respondent contends the ALJ's decision finding it responsible for claimant's medical treatment is erroneous, and claimant's claim is barred because her injury is the result of an activity of day-to-day living.

Claimant argues her injury is the result of an action that was unique to her work duties and not an activity of daily living. Claimant further claims she is entitled to medical treatment because had it not been for her employment with respondent, she would not have contorted her body and injured her back.

The issues for the Board's review are: Did claimant's injury arise out of and in the course of her employment with respondent? Is claimant's injury barred because her injury is a result of an activity of daily living?

FINDINGS OF FACT

Claimant was employed by respondent as a food service employee, which required such activities as lifting, reaching, bending, twisting, and stooping. She worked in the kitchen cooking and serving meals, stocking and replenishing supplies, and cleaning the area during and after the course of six lunch periods involving approximately 350 grade school students.

On November 1, 2012, between lunch periods, claimant went to restock and replenish the inventory on the condiment stand in the lunch room. The condiment stand is a stainless steel counter approximately 30 inches tall with foldout expansions that are extended during lunch periods. Claimant reached under a protruding shelf to retrieve a box of plastic drinking straws from the storage cabinet and suffered back pain when she stood back up and took a step to the left. She contends she had limited space in which to maneuver as well as a time constraint that made her actions hurried and awkward. Claimant testified she had no prior back injuries.

Claimant reported her injury immediately and was referred to Occupational Health Services by respondent, where she was examined twice and received conservative treatment for lumbar strain. Claimant was placed on restrictions before her release to full duty. Upon her return to work, claimant testified she continued to have pain in her lower back which made work difficult. She was notified that her claim was being denied by respondent. Claimant then contacted her primary care physician, Dr. Lisa Pioli, who placed her on severe restrictions and prescribed pain medication. Respondent was unable to accommodate claimant's restrictions.

On December 18, 2012, on an unauthorized basis, claimant was referred to Dr. Michael Poppa by her counsel for an independent medical evaluation. Dr. Poppa recommended claimant undergo an MRI of her lumbar spine and an EMG of her lower extremities and said, depending upon the results of these tests, claimant will require additional treatment such as pain management, physical therapy, injections and possibly surgery. Dr. Poppa stated claimant's employment "was the prevailing factor in causing her injury, medical treatment and disability. The prevailing factor is defined as the primary factor in relation to any other factor."[1] He recommended claimant be restricted to sedentary work.

[1] P.H. Trans., Cl. Ex. 2 at 4.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508(f) states in part:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
>
> . . . .
>
> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

1. Does claimant's injury arise out of her employment?

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all the circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[2]

Claimant, in the course of her employment as a cook, was required to bend down underneath a condiment counter, which was built at a height to accommodate elementary school students. When the injury occurred, claimant was retrieving a box of straws. Unlike a normal kitchen storage area under a counter top, the counter was built to accommodate small children and the counter had a protruding 16-inch metal shelf under which claimant had to reach in order to access the storage cabinet.

Dr. Poppa's report states that claimant's employment with respondent is the prevailing factor causing her injury and the need for medical treatment. Respondent has produced no compelling evidence to find otherwise.

In *Bryant* the Supreme Court stated:

> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? ... [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment."[3]

This Board member finds that claimant was injured as a consequence of activities specific to her employment.

---

[2] *Newman v. Bennett*, 212 Kan. 562, 566-67, 512 P.2d 497 (1973).

[3] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011), quoting 1 Larson's Workers' Compensation Law § 1.03[1] (2011).

2. Is the injury the result of activities of daily living?

There is no evidence in the record to support that claimant's injury and need for medical treatment resulted from an activity of daily living. Bending down under a 30-inch metal counter with a 16-inch overhang made to accommodate elementary school students is not an activity of daily living.

The court in *Bryant* stated:

> [T]he focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement—bending, twisting, lifting, walking, or other body motions—but looks to the overall context of what the worker was doing—welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[4]

It is hard to imagine a circumstance during non-working hours that claimant would be required to sustain the same awkward position required to reach under the counter as described in her testimony. This Board member finds that, based upon the overall context of what claimant was doing at the time of her injury, the activities that caused her injury were not activities of daily living.

CONCLUSION

This Board member finds that claimant suffered an injury by accident arising out of her employment with respondent that was not caused by an activity of daily living.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

---

[4] *Bryant* at 596.

[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated February 20, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2013.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
lwheeler@markandburkhead.com

Christopher McCurdy, Attorney for Self-Insured Respondent
cmccurdy@wallacesaunders.com

Kenneth J. Hursh, Administrative Law Judge